

# Michigan Journal of International Law

---

Volume 41 | Issue 1

---

2020

## Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined

Christa-Gaye Kerr

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Courts Commons](#), [Criminal Law Commons](#), [International Law Commons](#), and the [Organizations Law Commons](#)

---

### Recommended Citation

Christa-Gaye Kerr, *Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined*, 41 MICH. J. INT'L L. 195 (2020).

Available at: <https://repository.law.umich.edu/mjil/vol41/iss1/5>

<https://doi.org/10.36642/mjil.41.1.sovereign>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# SOVEREIGN IMMUNITY, THE AU, AND THE ICC: LEGITIMACY UNDERMINED

Christa-Gaye Kerr\*

The International Criminal Court (the “ICC” or “the Court”) was created with the expectation that it would supplement regional and national judicial systems and that it would be a court of last resort.<sup>1</sup> The Rome Statute highlights that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crime.”<sup>2</sup> Because of its supplementary role, the ICC’s jurisdiction can only be invoked in limited situations: namely, when regional and national courts are unwilling or unable to prosecute criminals, when the United Nations Security Council (“UNSC”) instructs the Court to act, or when individual states refer situations to the Court.<sup>3</sup> In its sixteen-year history, the Court’s jurisdiction has been invoked through all three methods, resulting in charges in eleven cases.<sup>4</sup> In ten of these cases, the defendant has been African.<sup>5</sup>

The disproportionality of these numbers has led to criticism that the ICC is just another tool for enforcing Western political influence over international justice.<sup>6</sup> The Court’s critics see its record of failing to prosecute serious international crimes outside of Africa as “sidelin[ing]

---

\* Articles Editor, *Michigan Journal of International Law*; J.D. Candidate, University of Michigan Law School, 2020. I would like to thank the *MJIL* editors who worked on this piece for their invaluable feedback and keen attention to detail. I would also like to thank Professor Laura Beny for her constant encouragement and her belief. To my family and friends, thank you for your unwavering support through law school and through this process.

1. INT’L CRIMINAL COURT, *About*, <https://www.icc-cpi.int/about> (last visited Dec. 17, 2019).

2. Rome Statute of the Int’l Crim. Ct. pmbl., 17 July 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. *Id.* arts. 13–15 *ter.* As outlined in article 13, “[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.” *Id.*

4. INT’L CRIMINAL COURT, *Situations Under Investigation*, <https://www.icc-cpi.int/pages/situations.aspx> (last visited Dec. 17, 2019) [hereinafter ICC Situations] (stating that the ICC currently has investigations ongoing in Burundi, Georgia, Central African Republic [two cases], Mali, Côte d’Ivoire, Libya, Kenya, Sudan, Uganda, and the Democratic Republic of Congo).

5. *Id.*

6. See, e.g., Lee J. M. Seymour, *The ICC and Africa: Rhetoric, Hypocrisy Management, and Legitimacy*, in *AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE*, 107, 109 (Kamari M. Clarke et al. eds., 2016).

Africans as it favours Western intervention in the guise of universal justice.”<sup>7</sup>

The African Union (“AU”) is one of the loudest critics of the ICC and its disproportionate indictments. The African Union was launched in July 2002 with the goal of “realis[ing] Africa’s potential”<sup>8</sup> by focusing on the “cooperation and integration of African states to drive Africa’s growth and economic development.”<sup>9</sup> The AU—comprised of all of the African states recognized by the United Nations (“UN”), along with the Sahrawi Arab Democratic Republic—lists its goals as:

Defend[ing] the sovereignty, territorial integrity, and independence of its Member States; . . . promot[ing] and defend[ing] African common positions on issues of interest to the continent and its peoples; encourage[ing] international cooperation; promot[ing] peace, security, and stability on the continent; promot[ing] democratic principles and institutions, popular participation, and good governance; [and] promot[ing] and protect[ing] human and peoples’ rights in accordance with . . . human rights instruments.<sup>10</sup>

With these goals in mind, the African Union has come to see the ICC’s prosecutions of African heads of state as undermining the growth and stability it is trying to achieve.<sup>11</sup> Its claims that the ICC acts as a tool to promote Western influence over Africa and Africans stem from the belief that the ICC’s work is prejudiced and that the Court undermines the advances that had been made, and that are being made, by Africans in ways that are similar to the “scramble for Africa”<sup>12</sup> formalized at the Berlin Conference in 1884.<sup>13</sup>

---

7. *Id.*

8. AFRICAN UNION, *About the African Union*, <https://au.int/en/overview> (last visited Dec. 17, 2019).

9. *Id.*

10. *Id.*

11. African Union Assembly, 13<sup>th</sup> Sess., Decisions and Declarations, Assembly/AU/Dec.245(XIII) Rev.1, ¶ 3 (July 3, 2009).

12. The “scramble for Africa” was the occupation, division, and colonization of African territory by European powers from 1881 to 1914, culminating in the Berlin conference. See Patrick Brantlinger, *Victorians and Africans: The Genealogy of the Myth of the Dark Continent*, 12 CRITICAL INQUIRY 166 (1985) (containing an in-depth discussion on the Berlin Conference and the scramble for Africa).

13. Mwangi S. Kimenyi, *Can the International Criminal Court Play Fair in Africa?*, BROOKINGS (Oct. 17, 2013), <https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/>; Marisa O’Toole, *Africa and the International Criminal Court: Behind the Backlash and Toward Future Solutions*, BOWDOIN DIGITAL COMMONS 1, 18–21 (2017); Rowland J. V. Cole, *Africa’s Relationship with the International Criminal Court: More Political Than Legal*, 14 MELB. J. INT’L L. 670 (2013).

Beginning when the ICC issued an arrest warrant for Sudanese President Omar al-Bashir in 2009,<sup>14</sup> these claims of prejudice have soured the once congenial relationship between the AU and the ICC.<sup>15</sup> Since that time, the ICC has issued indictments against at least twenty-one other Africans and has investigated at least six situations in African countries.<sup>16</sup> The AU vehemently opposed some of these indictments on the grounds that they violate the sovereign immunity that state leaders hold.<sup>17</sup> Consequently, the ICC's decisions to continue pursuing these indictments led the AU to call for a mass withdrawal of African states from the ICC's founding treaty, the Rome Statute.<sup>18</sup> The AU's position has been met with both support and contempt.<sup>19</sup>

This note examines the ICC's treatment of sovereign immunity, specifically through the indictments of al-Bashir and Kenya's President Uhuru Kenyatta and Deputy President William Ruto. These three indictments have drawn particular criticism from the AU for violating the principle of sovereign immunity.<sup>20</sup> Through the lens of these indictments, this note concludes that the ICC's tendency to ignore sovereign immunity—perhaps as a result of the Court's close relationship with the UNSC—does little to help it gain legitimacy in Africa and in the wider world and, more than anything, undermines the noble work encoded in the ICC's mandate. To show this, the note first delves into the background of the two organizations (the AU and the ICC) and the relationship they had prior to al-Bashir's first indictment (Part I). It then examines the doctrine of sovereign immunity and how the ICC has managed to make the defense nugatory for both States Parties and non-State Parties (Part II). Next, this note looks at the current relationship between the two organizations and how the breakdown in their relationship caused by the ICC's treatment of sovereign

---

14. Abel S. Knottnerus, *The AU, the ICC, and the Prosecution of African Presidents*, in AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE 154 (Kamari M. Clarke et al. eds., 2016); Manisuli Ssenyonjo, *The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders*, 13 INT'L CRIM. L. REV. 385, 386–87 (2013).

15. Knottnerus, *supra* note 14, at 152–53. See also Cole, *supra* note 13, at 671.

16. INT'L CRIMINAL COURT, *Cases*, <https://www.icc-cpi.int/cases> (last visited Dec. 17, 2019). To date, the ICC has publicly indicted forty-four people. *Id.* Twenty-one of those people are African and were indicted after al-Bashir. *Id.* Since al-Bashir's indictment, the ICC has investigated situations in seven countries, six of which are African countries. *Id.* Those countries are Kenya, Libya, Côte d'Ivoire, Mali, the Central African Republic, and Burundi. *Id.*

17. African Union Assembly, Extraordinary Sess., Decisions and Declarations, Ext/Assembly/AU/Dec. 1, ¶¶ 4–5, 10 (Oct. 12, 2013).

18. Seymour, *supra* note 6, at 107–08.

19. See Aoife F. Martin, Note, *Stop Letting Them Get Away with Murder: The Need to Limit the Use of Head of State Immunity as a Defense for War Crimes and Crimes Against Humanity*, 48 SUFFOLK U. L. REV. 923, 938–39 (2015).

20. Ssenyonjo, *supra* note 14, at 388–89; INT'L CRIM. CT., *Darfur, Sudan: Situation in Darfur, Sudan ICC-02/05*, <https://www.icc-cpi.int/darfur> (last visited Dec. 17, 2019).

immunity has delegitimized the ICC, at least in Africa (Part III). Lastly, this paper presents the AU's response to the legitimacy crisis and proposes solutions for the ICC that would see the Court sever (or lessen) its relationship with the UNSC, adopt transparency measures that would help it return to the initial principles that brought African nations on board in the first place, and integrates aspect of legal (and cultural) institutions from the countries it investigates to help create a sense of cooperation between the Court and the nations it serves (Part IV).

### I. HISTORY OF THE INTERNATIONAL CRIMINAL COURT AND THE AFRICAN UNION

The creation of the ICC was lauded as "a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law."<sup>21</sup> The Court was created on July 17, 1998, when 120 states adopted the Rome Statute of the International Criminal Court (the "Rome Statute" or the "Statute"). The Rome Statute entered into force on July 1, 2002 after ratification by sixty countries.<sup>22</sup> The ICC's primary function is to prosecute individuals for four international crimes: genocide, war crimes, crimes of aggression, and crimes against humanity.<sup>23</sup> These crimes are seen as "the most serious crimes of concern to the international community as a whole[, which] must not go unpunished."<sup>24</sup>

The AU's relationship with the ICC began amicably. Indeed, African states and organizations were among the first proponents of the creation of the Court.<sup>25</sup> In addition, African lawyers and human rights campaigners made significant contributions during campaigns for the creation of the International Criminal Court.<sup>26</sup> Africa's support for the ICC originated from the belief that the Court would help to uphold the rule of law when it came to the abuses and aggressive actions of more powerful states and would give African States Parties a more prominent position within international society.<sup>27</sup> For African states, the ICC was to be the bastion of justice that brought an end to the impunity that other, more powerful, states had flaunted.<sup>28</sup>

---

21. U.N. Secretary General, *Secretary-General Says Establishment of International Criminal Court Is Major Step in March Towards Universal Human Rights, Rule of Law*, U.N. PRESS RELEASE L/2890 (July 20, 1998).

22. INT'L CRIMINAL COURT, *About*, *supra* note 1. On April 11, 2002 sixty-six states ratified the Rome Statute—surpassing the sixty-state ratification threshold—allowing the Court's temporal jurisdiction to begin on July 1, 2002.

23. Rome Statute, *supra* note 2, pmbl.

24. *Id.*

25. Ssenyonjo *supra* note 14, at 385–86.

26. Seymour, *supra* note 6, at 108.

27. *Id.* at 107.

28. *Id.*

On February 2, 1999, Senegal was the first state to ratify the Rome Statute, followed soon after by Liberia, the Democratic Republic of Congo, Burundi, and the Central African Republic.<sup>29</sup> Currently, thirty-four African states, or two-thirds of all AU Member States, are represented among the States Parties to the Rome Statute.<sup>30</sup> This makes Africa the largest regional bloc represented in the ICC's Assembly of States Parties and "underscores the stakes in the present crisis of Africa-ICC relations."<sup>31</sup>

The breakdown in camaraderie between the AU and the ICC began with the indictment of Sudanese President Omar al-Bashir.<sup>32</sup> The relationship worsened after the ICC issued arrest warrants for Kenyan heads of state Uhuru Kenyatta and William Ruto, and it continues to deteriorate today because of what the AU sees as the Court's continued bias in pursuit of African heads of state.<sup>33</sup> In particular, the AU argues that the numerous and unabating prosecutions of Africans have created issues of "prosecution versus peace; arrest versus immunity; and trial [participation] versus presidential responsibilities."<sup>34</sup> The AU sees the ICC's indictment and prosecution of African leaders as both hypocritical and a threat to the stability and sovereignty that heads of state are granted through customary international law.<sup>35</sup> As a result, the AU has chosen to adopt a policy of obstruction towards the ICC.<sup>36</sup>

#### A. *The Prosecution of Sudan's Omar Al-Bashir*

In 2009, the Chief Prosecutor of the ICC issued an initial arrest warrant for al-Bashir for war crimes committed since 2003 in the Darfur region.<sup>37</sup> The case was referred to the ICC by the UNSC in 2005, under Resolution 1593.<sup>38</sup> The ICC issued this arrest warrant with the intention of bringing justice to victims of the genocide and curbing the impunity that al-Bashir had enjoyed since the beginning of the conflict in the Darfur.<sup>39</sup> The Court issued a second arrest warrant in 2010, which added three additional charges

---

29. *Id.*

30. *Id.*

31. *Id.*

32. Ssenyonjo *supra* note 14, at 385–91.

33. Seymour, *supra* note 6, at 108–09.

34. Knottnerus, *supra* note 14, at 153.

35. Seymour, *supra* note 6, at 108; Knottnerus, *supra* note 14, at 152.

36. Ssenyonjo, *supra* note 14, at 386–87.

37. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, ¶¶ 223–36 (Mar. 4, 2009). On 14 July 2008, the ICC's Prosecutor filed ten charges of war crimes against al-Bashir, including three counts of genocide, five of crimes against humanity, and two of murder. *Id.*

38. S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

39. *Id.*

for genocide.<sup>40</sup> That arrest warrant alleged that al-Bashir masterminded and implemented plans to annihilate three Sudanese ethnic groups—the Fur, Masalit, and Zaghawa—through murder, rape, and deportation.<sup>41</sup>

However, some members of the AU did not see the arrest warrants as a means for bringing justice to the region.<sup>42</sup> Instead, they decried what they saw as an injustice against the sitting head of a state that was not party to the ICC's governing Rome Statute.<sup>43</sup> Former Libyan President and then AU Chairman Muammar Gaddafi<sup>44</sup> described al-Bashir's indictment as a form of terrorism instigated by the First World and as an effort "by [Western states] to recolonize their former colonies."<sup>45</sup> Arab and African leaders also saw al-Bashir's arrest warrant as a way to undermine the "unity and stability" that Sudan had developed under al-Bashir's reign.<sup>46</sup>

Since the issuance of the arrest warrant, al-Bashir has traveled to and from countries both inside and outside of Africa with impunity.<sup>47</sup> After the thirteenth African Union Summit in 2009, the AU released a declaration stating that the members of the Union would "not co-operate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities for the arrest and surrender of Sudanese President Omar al-Bashir to the ICC."<sup>48</sup> Soon afterward, South African President Jacob Zuma affirmed that his country would not extradite al-Bashir, and, true to his

---

40. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest, at 8 (July 12, 2010).

41. *Id.* at ¶ 8.

42. Seymour, *supra* note 6, at 113–14.

43. *Id.* While the Rome Statute does not expressly give the ICC jurisdiction over non-parties, the UNSC's ability to refer cases to the ICC gives the Court *de facto* jurisdiction over states that are parties to the UN Charter but not the Rome Statute. *See infra* Part II.

44. Gaddafi's morality is questionable (as he himself was a dictator against whom the ICC would bring charges of crimes against humanity and war crimes in 2011), but, as one of the founders of the African Union, its former Chairperson, and the loudest voice against al-Bashir's indictments, his statements on the matter provide valuable insight into the reasons for the deteriorating relationship between the AU and the ICC.

45. *Sudan Leader in Qatar for Summit*, BBC NEWS (Mar. 29, 2009), <http://news.bbc.co.uk/2/hi/7970892.stm>.

46. *Arab Leaders Snub al-Bashir Warrant*, AL JAZEERA (Mar. 31, 2009), <https://www.aljazeera.com/news/middleeast/2009/03/2009330175846714662.html>.

47. *Bashir Travel Map*, BASHIR-WATCH, <http://bashirwatch.org> (last visited Dec. 17, 2019). Since the issuance of the first arrest warrant against him, al-Bashir has travelled outside of the African continent to India, Iran, Iraq, Kuwait, Qatar, and Saudi Arabia. *Id.*

48. African Union Assembly, 13<sup>th</sup> Sess., Decisions and Declarations, Assembly/AU/Dec.245(XIII) Rev.1, ¶ 10 (July 3, 2009); Bathandwa Mbola, *AU leaders will not Extradite Al Bashir*, SOUTH AFRICAN GOVERNMENT NEWS AGENCY (July 6, 2009), <http://www.sanews.gov.za/south-africa/au-leaders-will-not-extradite-al-bashir>.

word, he refused to do so when al-Bashir visited South Africa in 2015—in contravention of the Court’s order.<sup>49</sup>

Before his visit to South Africa in 2015, al-Bashir’s most notable visits within the African continent were to Chad and Kenya in 2010.<sup>50</sup> In July 2010, al-Bashir visited Chad to attend the Summit of the Sahel-Saharan States.<sup>51</sup> At the time of al-Bashir’s visit, Chad’s Interior and Security minister stated, “We are not obliged to arrest Omar Hassan al-Bashir[.] Bashir is a sitting president. I have never seen a sitting president arrested on his travels by the host country.”<sup>52</sup> Chad’s decision not to arrest al-Bashir made it the first State Party to the Rome Statute to harbor “knowingly and willingly[,] a fugitive . . . wanted by the Court.”<sup>53</sup>

The Republic of Kenya also hosted President al-Bashir in August 2010, inviting him to celebrate the signing of Kenya’s new constitution.<sup>54</sup> In response to allegations that Kenya was flouting article 87(7) of the Rome Statute, the Kenyan Minister of Foreign Affairs explained his government’s refusal to execute the arrest warrant by noting his country’s “competing obligations toward the Court, the African Union, and regional peace and stability.”<sup>55</sup>

The international community vehemently criticized Chad and Kenya for not acquiescing to the ICC’s demand to arrest and surrender al-Bashir to the Court.<sup>56</sup> For instance, the international non-profit human rights organization

49. Wendell Roelf, *South African President Defends Failure to Arrest Sudan’s Bashir*, REUTERS (Aug. 6, 2015), <https://www.reuters.com/article/us-safrica-bashir-idUSKCN0QB1S520150806>.

50. Tom White, *States ‘Failing to Seize Sudan’s Dictator Despite Genocide Charge’*, THE GUARDIAN (Oct. 21, 2018), <https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant>; Xan Rice, *Chad Refuses to Arrest Omar al-Bashir on Genocide Charges*, THE GUARDIAN (July 22, 2010), <https://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>. The notoriety of these two visits stemmed from how soon after the issuance of the second arrest warrant al-Bashir was welcomed into each country; the first of these two trips, to Chad, was on July, 22, 2010, just a week after the second arrest warrant was issued, while al-Bashir’s trip to Kenya was only a month later on August 27, 2010.

51. Rice, *supra* note 50.

52. *Id.*

53. *Chad: Hosting Once Again President al-Bashir Would Be a Further Insult to the Victims of Darfur*, NO PEACE WITHOUT JUSTICE, (Apr. 8, 2013), <http://www.npwj.org/ICC/Chad-should-stand-justice-and-not-grant-impunity-President-al-Bashir.html-0>.

54. *Kenya Defends Failure to Arrest Sudan’s President Omar al-Bashir in Nairobi*, THE GUARDIAN (Aug. 29, 2010), <https://www.theguardian.com/world/2010/aug/29/kenya-omar-al-bashir-arrest-failure>.

55. Press Release, Assembly of States Parties, President of the Assembly of States Parties Meets Minister of Foreign Affairs of Kenya, ICC Press Release ICC-ASP-20100921-PR575 (Sept. 21, 2010).

56. See, e.g., Alan Cowell, *Sudan Leader Travels Despite Warrant*, N.Y. TIMES (Aug. 27, 2010), <https://www.nytimes.com/2010/08/28/world/africa/28sudan.html>; *Chad Failed to Arrest Sudanese President, ICC Tells Security Council*, UN NEWS, (Dec. 13, 2011), <https://news.un.org/en/story/2011/12/398212-chad-failed-arrest-sudanese-president-icc-tells-security>.



No Peace Without Justice criticized Chad's decision and subsequent inaction because "[a]s a State Party to the Rome Statute of the [ICC], Chad is obliged to arrest any person against whom the Court had issued an arrest warrant."<sup>57</sup>

### B. *Prosecution of Kenya's Uhuru Kenyatta and William Ruto*

In 2010, the ICC issued individual arrest warrants for Kenyan President Uhuru Kenyatta and Deputy President William Ruto.<sup>58</sup> The warrants accused Kenyatta and Ruto of crimes against humanity during the post-election violence in 2007 and 2008<sup>59</sup> and were issued through the Prosecutor's *proprio motu* powers.<sup>60</sup>

Because Kenya was a party to the Rome Statute, the AU could not argue that Kenyatta and Ruto were immune to prosecution by the ICC as heads of a state not party to the Rome Statute, as it did in al-Bashir's case. Nevertheless, it argued that Kenyatta and Ruto were immune from

---

council; *Kenya Refuses to Arrest Sudanese President Omar al-Bashir*, AMNESTY INTERNATIONAL, (Aug. 27, 2010), <https://www.amnesty.org/en/latest/news/2010/08/kenia-se-niega-detener-presidente-sudanes>; Resolution on Kenya: Failure to Arrest President Omar al-Bashir, Eur. Parl. Doc P7\_TA-PROV(2010)0315, available at <http://www.europarl.europa.eu/document/activities/cont/201009/20100917ATT82761/20100917ATT82761EN.pdf>.

57. Alison Smith, *NPWJ Calls on ICC and States Parties to Respond Strongly to Chad's Failure to Arrest President Bashir of Sudan*, NO PEACE WITHOUT JUSTICE, (Jul. 24, 2010), <http://www.npwj.org/ICC/NPWJ-calls-ICC-and-States-Parties-respond-strongly-Chad%E2%80%99s-failure-arrest-President-Bashir-Sudan>.

58. At the time of the indictment, Kenyatta was Deputy Prime Minister and the Minister of Finance and Ruto was the Minister of Higher Education, Science, and Technology. Kenyatta and Ruto were two of six suspects named by the ICC Prosecutor as being responsible for planning and funding violence associated with the 2007–2008 Kenyan Crisis, but they were the only people indicted. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012); Prosecutor v. Ruto, Case No. 01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012). Despite the indictments, the national awareness of these indictments, and a failed petition to bar them from running in the elections because of the indictments, Kenyatta and Ruto won the 2013 presidential election, becoming President and Deputy President respectively. Paul Ogemba, *Uhuru, Ruto Get Green Light to Run for State House*, DAILY NATION, (Feb. 16, 2013), <https://web.archive.org/web/20130327004140/http://elections.nation.co.ke/news/Uhuru-Ruto-get-green-light-to-run-for-State-House-/1631868/1695520/-/146x14c/-/index.html>; Sudarsan Raghavan, *Kenyatta Wins Kenya Presidential Election by Narrow Margin*, WASH. POST, (Mar. 9, 2013), [https://www.washingtonpost.com/world/africa/kenyatta-wins-kenya-presidential-election-by-narrow-margin/2013/03/09/c07ae7fa-88b1-11e2-9d71-f0feafdd1394\\_story.html](https://www.washingtonpost.com/world/africa/kenyatta-wins-kenya-presidential-election-by-narrow-margin/2013/03/09/c07ae7fa-88b1-11e2-9d71-f0feafdd1394_story.html).

59. Specifically, deportation, inhumane acts, murder, persecution, and rape. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11 and Prosecutor v. Ruto, Case No. 01/09-01/11, *supra* note 58.

60. INT'L CRIMINAL COURT, *Kenya*, <https://www.icc-cpi.int/kenya> (last visited Dec. 17, 2019). Actions *ex proprio motu* are actions "of one's own accord." *Ex proprio motu*, BLACK'S LAW DICTIONARY, (10th ed. 2014). The ICC Prosecutor's *ex proprio motu* powers are granted by article 15 of the Rome Statute. Rome Statute, *supra* note 2, art. 15.

prosecution while they held office.<sup>61</sup> On October 12, 2013, the African Union convened an Extraordinary Summit to discuss the AU's relationship with the ICC.<sup>62</sup> There, the AU Assembly, the highest decision-making body of the AU, decided "[t]hat no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office."<sup>63</sup> It then demanded "[t]hat the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, [] be suspended until they complete their terms in office."<sup>64</sup> The AU also claimed that since Kenya had such a large role to play in maintaining peace in the Darfur region, arresting Kenyatta and Ruto would only serve to undermine, and even upheave, related efforts.<sup>65</sup> Ultimately, the ICC Prosecutor dropped the charges against Kenyatta and Ruto because of witness intimidation.<sup>66</sup>

The Extraordinary Summit also served as an opportunity for some members of the AU to call for a mass withdrawal of African states from the ICC and the Rome Statute,<sup>67</sup> with the loudest voices coming from Kenya,

---

61. Knottnerus, *supra* note 14. Sovereign immunity will be discussed in Part II, *infra*.

62. African Union Assembly, Extraordinary Sess., Decisions and Declarations, Ext/Assembly/AU/Dec. 1, ¶¶ 4–5, 10 (Oct. 12, 2013).

63. AFRICAN UNION, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, art. 46A *bis*, [https://au.int/sites/default/files/treaties/36398-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf) [hereinafter Malabo Protocol].

64. *Id.* at ¶ 10(i)–(ii).

65. Knottnerus *supra* note 14, at 154.

66. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Notice of Withdrawal of Charges (Dec. 5, 2014); Kenya: *Official Apology for Past Wrongs*, N.Y. TIMES (Mar. 27, 2015), <https://www.nytimes.com/2015/03/27/world/africa/kenya-official-apology-for-past-wrongs.html>.

67. Article 127 of the Rome Statute allows for states to withdraw from the agreement. The article states:

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Rome Statute, *supra* note 2, art. 127.

Sudan, Rwanda, Namibia, Chad, Uganda, and Ethiopia.<sup>68</sup> In large part due to a lack of broader Assembly support for such a drastic measure, these calls did not result in a mass exodus from the ICC.<sup>69</sup> So far, Burundi is the only African nation that has successfully withdrawn from the ICC.<sup>70</sup> Although Gambia and South Africa initially wished to withdraw from the ICC and the Rome Statute, they have since withdrawn their notices of intent to leave.<sup>71</sup> (Gambia justified its initial decision to leave as “warranted by the fact that the ICC, despite being called the International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans.”<sup>72</sup> South Africa, meanwhile, cited a “conflict of the ICC’s Rome Statute with its domestic laws that grant leaders diplomatic immunity.”<sup>73</sup>)

Similarly, while Kenya indicated a desire to withdraw from the ICC, it has not done so. In response to the ICC’s warrants, which it perceived as the ICC’s attempt to meddle in its internal affairs, the Kenyan Parliament passed a nonbinding motion asking the government to “withdraw from the

68. African Union Assembly, Extraordinary Sess., Decisions and Declarations, Ext/Assembly/AU/Dec. 1, ¶¶ 4–5, 10 (Oct. 12, 2013); *See* African Union, Withdrawal Strategy Document (Draft 2) (Jan. 12, 2017) [hereinafter Withdrawal Strategy Document], [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf).

69. Anthony Wang, *On the Failed Authority of the International Criminal Court*, INT’L POLICY DIGEST (Jun. 15, 2018), <https://intpolicydigest.org/2018/06/15/on-the-failed-authority-of-the-international-criminal-court>.

70. *Burundi First to Leave International Criminal Court*, AL JAZEERA, (Oct. 27, 2017), <https://www.aljazeera.com/news/2017/10/burundi-leave-international-criminal-court-171027080533712.html>. Burundi’s decision is believed to have been precipitated by the Prosecutor’s “decision to investigate atrocities meted on civilians and human rights violation[s] [in Burundi between 2015 and 2017 arising from] political violence.” *See* Bob Koigi, *Future of ICC in Doubt After African Countries Withdraw*, EURACTIV (Nov. 11, 2016), <https://www.euractiv.com/section/global-europe/news/future-of-icc-in-doubt-after-african-countries-withdraw>; Toby Sterling & Katharine Houreld, *Burundi Rejects International Criminal Court War Crimes Investigation*, REUTERS, (Nov. 10, 2017), <https://www.reuters.com/article/us-warcrimes-burundi/burundi-rejects-international-criminal-court-war-crimes-investigation-idUSKBN1DA1IH>.

In 2019, the Philippines also officially withdrew from the Rome Statute, thereby ending its official association with the ICC. *See Philippines Officially Out of the International Criminal Court*, AL JAZEERA (Mar. 17, 2019), <https://www.aljazeera.com/news/2019/03/philippines-officially-international-criminal-court-190317171005619.html>.

71. Gambia’s notice of withdrawal was rescinded after a new government took office. South Africa’s was rescinded after the High Court of South Africa ruled that the notice was illegal under domestic law because it required parliamentary approval, which was not sought. Elise Keppler, *Gambia Rejoins ICC*, HUMAN RIGHTS WATCH, (Feb. 17, 2017), <https://www.hrw.org/news/2017/02/17/gambia-rejoins-icc>; *South Africa’s Decision to Leave ICC Ruled ‘Invalid’*, BBC NEWS, (Feb. 22, 2017), <https://www.bbc.com/news/world-africa-39050408>.

72. Joe Bavier, *Gambia Announces Withdrawal from International Criminal Court*, REUTERS, (Oct. 25, 2016), <https://www.reuters.com/article/us-gambia-icc/gambia-announces-withdrawal-from-international-criminal-court-idUSKCN12P335>.

73. Koigi, *supra* note 70.

Rome Statute and repeal the International Crimes Act.”<sup>74</sup> However, the government did not comply, and Kenya, like Gambia and South Africa, remains a State Party to the Rome Statute.

## II. SOVEREIGN IMMUNITY’S ROLE AT THE ICC

One of the AU’s main grievances with the ICC concerns the Court’s ability to prosecute sitting heads of state, like al-Bashir, Kenyatta, and Ruto.<sup>75</sup> In particular, the AU argues that the ICC’s attempt to exercise jurisdiction over these three men violated the doctrine of sovereign immunity.<sup>76</sup> In other words, according to the AU, al-Bashir, Kenyatta, and Ruto are (or were) immune from prosecution by virtue of their roles as sitting heads of state for their respective countries.<sup>77</sup> Contrary to the AU’s assertion, though it is true that all three men hold some immunity because of their positions, sitting heads of state do not possess absolute immunity simply because they currently hold office.<sup>78</sup>

### A. Head of State Immunity Generally

Heads of state, whether current or former, used to enjoy absolute immunity. The development of international law and the emergence of new customs, however, has led to the erosion of this form of immunity.<sup>79</sup> As a result, under the current theory of “restrictive immunity,” heads of state can be prosecuted for certain acts that are deemed egregious, such as war crimes

---

74. Firew Tiba, *The Prosecution of Sitting Heads of State by the International Criminal Court*, 21 WILLIAMETTE J. INT’L L. & DISP. RES. 134, 144 (2013).

75. In al-Bashir’s case, this is further complicated by the fact that Sudan is neither a signatory nor a Party to the Rome Statute, as mentioned above.

76. See African Union Assembly, 18<sup>th</sup> Sess., Decisions and Declarations, Assembly/AU/Dec.397(XVIII), ¶6 (Jan. 30, 2012); African Union Assembly, Extraordinary Sess., Decisions and Declarations, Assembly/AU/Dec.1, ¶4 (Oct. 2013).

77. Knottnerus, *supra* note 14, at 152. It should be noted that al-Bashir was ousted from his role as head of state on April 11, 2019 by a coup. *Ousted Sudanese President al-Bashir Moved to Prison*, N.Y. TIMES, (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/world/africa/omar-bashir-prison.html>. Kenyatta and Ruto are still the incumbent President and Deputy President of Kenya. THE PRESIDENCY, *Executive Office of the President*, <http://www.president.go.ke/presidency> (last visited Dec. 17, 2019); THE PRESIDENCY, *Office of the Deputy President*, <http://www.president.go.ke/office-of-the-deputy-president> (last visited Dec. 17, 2019).

78. See, e.g., JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 83, 89–96 (2014); HAZEL FOX, THE LAW OF STATE IMMUNITY 686 (2d ed. 2008); RAMONA PEDRETTI, IMMUNITY OF HEADS OF STATE AND STATE OFFICIALS FOR INTERNATIONAL CRIMES 13 (2015); ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW (2008).

79. Guénaél Mettraux, et al., *Heads of State Immunities, International Crimes and President Bashir’s Visit to South Africa*, 18 INT’L CRIM. L. REV. 577, 583 (2018).

and crimes against humanity.<sup>80</sup> One rationale behind the move towards a restricted standard of sovereign immunity is that the “[a]bsolute immunity theory does not differentiate between civil or criminal actions, and thus provides little recourse for those seeking justice, even if they are seeking it for the most grave human rights violations.”<sup>81</sup> In contrast, the restrictive immunity theory ensures that the defense of immunity can never shield human rights violators, thereby allowing for prosecution of perpetrators and justice for victims.<sup>82</sup>

The arrest of General Augusto Pinochet by the United Kingdom in 1998 is arguably the most salient indication that the norms of international law have shifted from absolute immunity to a more restrictive view of sovereign immunity. In 1973, Pinochet led a *coup d'état* that ousted the then-President of Chile, Salvador Allende.<sup>83</sup> The violent aftermath of the coup led to human rights violations<sup>84</sup> for which he was indicted by a Spanish court in 1998.<sup>85</sup> Six days after the court's indictment, he was arrested in London and held there on charges of genocide, torture, hostage-taking, and large-scale murder.<sup>86</sup> During a hearing held in London to dismiss the arrest warrant issued by the Spanish court, Pinochet claimed immunity under the United Kingdom's State Immunity Act of 1978 as a former head of state.<sup>87</sup> The House of Lords, however, rejected his defense. It invoked the principle of universal jurisdiction, by which any state apprehending an alleged perpetrator is deemed competent to exercise its jurisdiction, and decreed that international crimes such as torture could not be protected by former-head-of-state immunity.<sup>88</sup> Pinochet's arrest marked the first time a nation used the principle of universal jurisdiction to arrest a foreign head of state for crimes that had been committed in that leader's country.<sup>89</sup> Thus, though

---

80. Martin *supra* note 19, at 924.

81. *Id.* at 928.

82. *Id.* at 929.

83. See generally, PETER KORNBLUTH, *THE PINOCHET FILE: A DECLASSIFIED DOSSIER OF ATROCITY AND ACCOUNTABILITY* (2d ed. 2013).

84. Pinochet's regime was responsible for various human rights abuses during its reign, including forced disappearances, murder, and the torture of political opponents. Monte Reel & J.Y. Smith, *A Chilean Dictator's Dark Legacy*, WASH. POST (Dec. 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/10/AR2006121000302.html>.

85. *Pinochet Arrested in London*, BBC NEWS, (Oct. 17, 1998), <http://news.bbc.co.uk/2/hi/europe/195413.stm>.

86. Andrea Bianchi, *Immunity Versus Human rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237, 277 (1999).

87. Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583, 1596 (2000).

88. *Id.* at 1598. This decision was overturned because of concerns about the impartiality of one of the judges but was later affirmed by a second panel.

89. *How General Pinochet's Detention Changed the Meaning of Justice*, AMNESTY INTERNATIONAL (Oct. 16, 2013), <https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice>. Universal jurisdiction is an international

Pinochet died before being convicted, his trial exemplified the increasing willingness of countries to hold foreign heads of state accountable for their actions, notwithstanding claims of sovereign immunity.<sup>90</sup> Moreover, it showed that the exercise of universal jurisdiction could be triggered by an individual's participation in genocide, torture, crimes against humanity, and war crimes.<sup>91</sup>

The arrest and trial of former Yugoslavian President Slobodan Milosevic by the International Criminal Tribunal for the Former Yugoslavia (the "tribunal" or the "ICTY") further demonstrates the move towards the restrictive theory of sovereign immunity. The ICTY indicted Milosevic in 1999 for crimes against humanity committed during the Kosovo War and, a year later, added additional charges for violating the laws or customs of war, breaching the Geneva Conventions in Croatia and Bosnia, and committing genocide in Bosnia.<sup>92</sup> Milosevic's trial, which lasted from 2002 until his death in 2006, was the first by an international tribunal of a sitting head of state for state-sanctioned criminal activities and violations of human rights law.<sup>93</sup>

Notably, Milosevic did not raise the defense of sovereign immunity. Some scholars argue that Milosevic did not raise the defense because "traditional notions of sovereign immunity [were already] disappearing in international law" and that, therefore, the defense would have served little to no purpose to his case.<sup>94</sup>

Evidence of the disappearance of traditional notions of sovereign immunity from international law can be found in the ICTY's founding statute, the 1993 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian

---

legal principle that reasons that certain activities are so reprehensible that the usual rules of jurisdiction are waived, and any state apprehending the alleged perpetrator is deemed competent to exercise its jurisdiction. VALERIE EPPS & LORIE GRAHAM, *EXAMPLES & EXPLANATIONS: INTERNATIONAL LAW* 140 (2d ed. 2015).

90. Martin, *supra* note 19, at 923.

91. Sison, *supra* note 87, at 1583–84.

92. See Case No. IT-02-54, Slobodan Milosevic: Kosovo, Croatia & Bosnia, Case Information Sheet, ¶ 1 (Int'l Crim. Trib. for the Former Yugoslavia) (an unofficial document detailing indictments against Milosevic including: genocide; complicity in genocide; deportation; murder; persecutions on political, racial or religious grounds; inhumane acts/forcible transfer; extermination; imprisonment; torture; willful killing; unlawful confinement; willfully causing great suffering; unlawful deportation or transfer; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; cruel treatment; plunder of public or private property; attacks on civilians; destruction or willful damage done to historic monuments and institutions dedicated to education or religion; unlawful attacks on civilian objects).

93. Tiba, *supra* note 74, at 136; Christina Amanpour et al., *Milosevic Indictment Makes History*, CNN, (May 27, 1999), <http://edition.cnn.com/WORLD/europe/9905/27/kosovo.milosevic.04>.

94. Scott Grosscup, *The Trial of Slobodan Milosevic: The Demise of Head of State Immunity and the Specter of Victor's Justice*, 32 DENV. J. INT'L L. & POL'Y 355, 365 (2004).

Law Committed in the Territory of the Former Yugoslavia since 1991. The statute gave the tribunal the power to prosecute “[a] person who planned, instigated, ordered, committed or otherwise aided” in the international crimes committed during the Kosovo War.<sup>95</sup> This power explicitly extended to the prosecution of sovereigns, as the statute further provided that “the official position of any accused person, whether as Head of State or Government[,] . . . shall not relieve such person of criminal responsibility nor mitigate punishment.”<sup>96</sup>

Though the statute creating the ICTY dismissed the notion of universal jurisdiction, the tribunal instead justified its unrestricted access to Milosevic—despite his role as a sitting head of state—as well as to his deputies, through the doctrine of primacy.<sup>97</sup> This access changed the landscape of sovereign immunity in international law, establishing precedent for the prosecution of crimes against humanity carried out by state actors.

### B. *Sovereign Immunity and the ICC*

Both the Pinochet and Milosevic indictments and arrests altered the doctrine of sovereign immunity and provided a basis for the ICC’s own method of sidestepping head-of-state immunity. However, the Court’s relationship with sovereign immunity is more similar to that of the ICTY (as used in its indictment and prosecution of Milosevic), than to the universal jurisdiction that was used in Pinochet’s case.<sup>98</sup>

The text of the Rome Statute is similar to the text of the ICTY’s founding statute. Article 27(1) of the Rome Statute explicitly provides that the defense of sovereign immunity does not bar the ICC from exercising jurisdiction over persons who are or were heads of state:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.<sup>99</sup>

Moreover, the plain language of article 27(2) of the statute clearly indicates that head of state immunity is not a valid defense at the ICC:

---

95. Statute of the International Tribunal for the Former Yugoslavia Res. 827, art. 7(1) (May 25, 1993) (amended July 7, 2009 by Res. 1877).

96. *Id.* art. 7(2).

97. Tiba, *supra* note 74, at 138.

98. *Id.* at 142.

99. Rome Statute, *supra* note 2, art. 27(1).

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>100</sup>

Notably, article 27 makes no distinction between states that are party to the Agreement and those that are not, and it thus bars the immunity defense for *all* individuals brought before the Court.<sup>101</sup> Article 27's ability to negate the head-of-state defense for States is therefore an example of the more restrictive standard for sovereign immunity which, as stated above, prevents the defense from being used to shield human rights violators.<sup>102</sup> By employing the restrictive standard, the Court has an avenue through which it can accomplish its mandate of securing justice for victims of human rights violations across the globe.

Article 13(b) further supplements article 27's ability to strip head-of-state immunity, and even extends the statute's applicability to non-party states. Article 13(b) denotes the UNSC's ability to refer cases to the ICC Prosecutor and states that the ICC can exercise its jurisdiction over a crime if "[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations[.]"<sup>103</sup>

As it currently stands, there are 194 signatories to the United Nations.<sup>104</sup> Chapter VII of the Charter states that all 194 signatories are legally bound to the resolutions passed by the UNSC; this includes resolutions recommending that the ICC Prosecutor bring charges against a head of state.<sup>105</sup> It has been posited that by signing the Charter, each State has implicitly waived the head-of-state defense in situations where the ICC brings charges based on the recommendation of the UNSC, regardless of whether the party is a signatory to the Rome Statute.<sup>106</sup> This argument suggests that the UNSC has universal jurisdiction, which allows it to bypass

---

100. *Id.* art 27(2).

101. *Id.* While article 27 makes no distinction between States that are party to the Statute and those that are not, it is widely accepted that it only applies to States that *are* party to the Statute based on the rules established in the Vienna Convention on the Law of Treaties. *But see* Sophie Papillon, *Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity*, 10 INT'L CRIM. L. REV. 275, 284 (2010) (discussing article 27's application to non-party states and the UNSC's ability to implicitly remove head of state immunity more generally).

102. Martin, *supra* note 19, at 929–30.

103. Rome Statute, *supra* note 2, art. 13(b).

104. UNITED NATIONS, *Overview*, <https://www.un.org/en/sections/about-un/overview/index.html> (last visited Dec. 17, 2019).

105. U.N. Charter ch. V, art. 25.

106. Papillon, *supra* note 101, at 280.



head-of-state immunity when necessary to prosecute international crimes.<sup>107</sup> Thus, taken together, articles 27 and 13(b) arguably give the ICC wide latitude to exercise jurisdiction over countries that are not party to its founding statute.

Nevertheless, while the Court does not recognize sovereign immunity as a defense, it does acknowledge that heads of state have certain other privileges of diplomatic immunity that may limit the Court's ability to apprehend them.<sup>108</sup> Because the ICC lacks a police force, it does not have the ability to arrest individuals it charges, and it instead relies on States Parties to assist it in the apprehension and extradition of individuals wanted by the Court.<sup>109</sup> However, the Rome Statute recognizes that there are limits to States Parties' ability to assist in this way.<sup>110</sup> Article 98(1) of the Statute speaks to the Court's limitations with respect to States Parties' obligations in assisting with the apprehension of defendants from third-party states.<sup>111</sup> The text states:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.<sup>112</sup>

In directing the ICC not to proceed with a request for arrest in circumstances where a State Party and a third state are involved, article 98(1) respects the doctrine of diplomatic immunity and ensures States Parties are not forced to balance competing legal obligations to the ICC and to other states.<sup>113</sup>

The AU applied article 98(1) to the ICC's requests to have al-Bashir arrested upon his arrival in countries that were States Parties. Like they did when the indictment was first announced, the AU argued that because al-

---

107. Olympia Bekou & Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter*, 56 INT'L COMP. L.Q. 49, 50–51 (2007) (arguing that referrals from the UNSC are the only instance in which the Court exercises universal jurisdiction).

108. Rome Statute, *supra* note 2, art. 98.

109. COALITION FOR THE INT'L CRIM. CT., *10 Ways States Can Support the ICC and Global Justice*, <http://www.coalitionfortheicc.org/10-ways-states-can-support-icc-and-global-justice> (last visited Dec. 17, 2019).

110. Papillon, *supra* note 101, at 285.

111. *But see* Johan D. van der Vyver, Note, *Prosecuting the President of Sudan: A Dispute Between the African Union and the International Criminal Court*, 11 AFR. HUM. RTS. L.J. 683, 683–84 (2011) (arguing otherwise and stating instead that article 98(2) contradicts article 27(2)).

112. Rome Statute, *supra* note 2, art. 98(1).

113. Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 421 (2004).

Bashir was the current head of a third-party state who enjoyed diplomatic immunity, African States Parties could not be required to arrest and surrender him to the ICC without Sudan's approval.<sup>114</sup>

The AU's notion that al-Bashir could not be apprehended and surrendered to the Court was challenged in a hearing before the Court's Pre-Trial Chamber ("PTC").<sup>115</sup> The PTC concluded that al-Bashir was not entitled to immunity because the UNSC had referred the situation in Sudan to the ICC, as allowed by article 13(b) of the Rome Statute,<sup>116</sup> by calling on the parties involved in the conflict in Darfur to co-operate in bringing al-Bashir to justice.<sup>117</sup> Moreover, the PTC determined that al-Bashir held no immunity because of the implicit waiver that accompanies being a signatory to the UN Charter<sup>118</sup>: Sudan, as a UN Member State, was obligated to abide by the UNSC's Resolution to surrender al-Bashir despite the fact that it was neither a signatory nor a Party to the Rome Statute. The PTC also concluded that States Parties, both in that role and as UN Member States, must abide by the UNSC's Resolution.<sup>119</sup> For better or for worse, the PTC's rejection of the AU's article 98(1) defense and its liberal reading of articles 13(b) and 27 give the ICC access to the UNSC's universal jurisdiction. Consequently, sitting heads of state who are alleged to have committed international crimes have few opportunities to avoid prosecution.

### III. THE DELEGITIMIZATION OF THE ICC

The ICC was created in order to deliver justice for the most heinous international crimes when national court systems are unable to do so.<sup>120</sup> Despite the Court's noble and admirable mission, it has always faced issues of legitimacy stemming primarily from how it handles sovereign

---

114. van der Vyver, *supra* note 111, at 685 (noting that Denmark also used this argument when it invited al-Bashir to Copenhagen).

115. The Pre-Trial Chamber ("PTC") is one of three divisions of the ICC, the other two being Trial and Appeals. The PTC is responsible for confirming or denying indictments. Additionally, "[t]he judges of the Pre-Trial Chamber will issue a warrant of arrest if there are reasonable grounds to believe that the person has committed a crime within the Court's jurisdiction and that the person will not appear voluntarily before the Court, will endanger the proceedings or investigation, or will continue committing crimes if not arrested." *See* INT'L CRIM. CT., *Pre-Trial Stage*, <https://www.icc-cpi.int/Pages/Pre-Trial.aspx> (last visited Dec. 17, 2019).

116. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, ¶¶ 223–36 (Mar. 4, 2009).

117. S.C. Res. 1593, *supra* note 38 at ¶2; van der Vyver, *supra* note 111, at 683–84.

118. *Id.* at 684, 696–70.

119. *Id.* at 696–70.

120. Rome Statute, *supra* note 2; Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, (July 11, 2008).

immunity.<sup>121</sup> In fact, one of the reasons the United States decided not to become a Party to the Rome Statute was that the statute lacks “an effective mechanism to prevent politicized prosecutions of American servicemembers and officials.”<sup>122</sup> The U.S. rationale overlaps with two of the AU’s biggest concerns with the court: (1) that there is no immunity for sitting officials (discussed above in Part II) and (2) that the Court, as an institution, can be easily politicized (discussed here in Part III).<sup>123</sup> The AU’s almost decade-long campaign against the ICC has only bolstered its concerns and has served to further undermine the Court’s legitimacy, particularly among smaller or weaker states.<sup>124</sup> If the beliefs and sentiments underlying the tenuous relationship between the ICC and the AU persist, the Court’s legitimacy may be even further undermined.

Allegations of ICC politicization come on the back of years of Western intervention in Africa, and the AU argues that the Court exists as a tool for the neo-colonialism and imperialism of more powerful Western countries.<sup>125</sup> This argument has the power to delegitimize the Court by giving the appearance that the Court is no longer seeking justice based on a legal mandate but is instead politically motivated. This argument has mixed support. On the one hand, the Court was designed to exist outside of the racial hierarchies that were created centuries ago through slavery, servitude, and colonialism.<sup>126</sup> Many of the Court’s supporters, including the International Development Law Organization’s Advisory Board Chairman, Professor Makau W. Mutua, and Former UN Secretary General Kofi Annan, believe the Court has managed to do so.<sup>127</sup> For example, Chairman Mutua once said it was preposterous to accuse the ICC of racial hypocrisy,<sup>128</sup> while Secretary General Annan made it known on multiple occasions that he believed the Court was not biased against Africans.<sup>129</sup>

---

121. Madeline Morris, *The Jurisdiction of The International Criminal Court over Nationals of Non-Party States (Conference Remarks)*, 6 ILSA J. INT’L & COMP. L. 363, 363 (1999).

122. DEPARTMENT OF DEFENSE, *Secretary Rumsfeld Statement on the ICC Treaty*, Release No. 233-02 (May 6, 2002), <http://archive.defense.gov/Releases/Release.aspx?ReleaseID=3337>.

123. Seymour, *supra* note 6, at 110–13.

124. *Id.* at 111.

125. *Id.* at 112; see Hiroyuki Tosa, *Global Constitutional Order and the Deviant Other: Reflections on the Dualistic Nature of the ICC Process*, 18 INT’L REL. ASIA-PACIFIC 45, 57–58 (2018).

126. Tosa, *supra* note 125, at 64–66; see generally Preparatory Committee on Establishment of International Criminal Court, *Conflict Between Security Council Powers, International Court, Discussed in Preparatory Committee*, U.N. Doc. L/2777 (Apr. 4, 1996).

127. Seymour, *supra* note 6, at 120.

128. *Id.*

129. *Annan Defends International Criminal Court*, NEWS24 (Oct. 8, 2013), <https://www.news24.com/Africa/News/Annan-defends-International-Criminal-Court-20131007>; “*I Stand by the ICC*”, *Kofi Annan Says, THIS IS AFRICA* (Nov. 21, 2016), <https://thisisafrica.me/stand-icc-kofi-annan-says>; *The International Criminal Court Is Not Biased Against Africans: Kofi*

For many, though, it is difficult to believe that the ICC is not biased when ten of the eleven cases currently being investigated are from Africa.<sup>130</sup> For instance, former Ethiopian Primer Minister Hailemariam Desalegn once stated, “African leaders have come to a consensus that the [ICC’s] process that has been conducted in Africa has a flaw. The intention was to avoid any kind of impunity . . . but now the process has degenerated to some kind of race hunting.”<sup>131</sup> Kenyatta, who admittedly has his own biases against the Court, has also made similar claims, stating, “[w]e would love nothing more than to have an international forum for justice and accountability, but what choice do we have when we get only bias and race-hunting at the ICC?”<sup>132</sup> Archbishop Emeritus of Cape Town Desmond Tutu shared this sentiment, stating, “[i]n a consistent world, those responsible for this suffering and loss of life should be treading the same path as some of their African and Asian peers who have been made to answer for their actions in the Hague.”<sup>133</sup>

Desalegn’s, Kenyatta’s, and Tutu’s comments show that despite the Court’s efforts—and Mutua’s and Annan’s words of support—it has failed to function outside of global racial hierarchies. It has failed for two specific reasons: first, because of the difficulty, if not impossibility, of existing outside of racial hierarchies as a multilateral organization; and second, because of the Court’s relationship with the UNSC.

#### A. *The ICC in the Context of Existing Global Systems*

As a multilateral judicial organization, the ICC must navigate the global systems—whether financial, political, or social—that existed before its creation. Because of its position as an international institution for justice, the Court is forced to interact with, and must consequently challenge, the racism that is embedded in the international system of justice as a result of the legacy of slavery, servitude, and colonialism.<sup>134</sup> Admittedly, this is not an easy task for the Court, but it is one that it must tackle—and tackle with care—if the Court is to gain supporters and maintain its legitimacy in the

---

Annan Says, THIS IS AFRICA (June 22, 2016), <https://thisisafrika.me/the-international-criminal-court-is-not-biased-against-africans-kofi-annan-says>.

130. ICC Situations, *supra* note 4.

131. Patryk I. Labuda, *The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity*, 20 AFR. Y.B. INT’L L. 289, 310 (2014).

132. Uhuru Kenyatta, President of Kenya, Speech at the Extraordinary Session of Heads of State and Government of the AU (Oct. 12, 2013), <https://www.standardmedia.co.ke/article/2000095433/speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union>.

133. *Desmond Tutu Calls for Bush, Blair to Face Hague*, FRANCE 24 (Sept. 2, 2012), <https://www.france24.com/en/20120902-desmond-tutu-calls-bush-blair-trial-hague-iraq-war-weapons-mass-destruction-uk-usa>.

134. Tosa, *supra* note 125, at 57. The legacy of slavery, servitude, and colonialism is particularly shown in the countries that are able to dominate the proceedings of the UNSC, and thus the ICC, despite not being Parties to the Rome Statute. *Id.*

global arena, especially in Africa. In a speech he made after al-Bashir's indictment, Paul Kagame, the current President of Rwanda, stated:

Rwanda cannot be party to ICC for one simple reason . . . with [the] ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries. Two thirds of the countries that have signed for this ICC are these poor countries. When they were signing they didn't know what they were signing. They don't know they were signing for a rope to hang themselves.<sup>135</sup>

Statements like these regarding the flawed and biased nature of the Court sound in truth to many state leaders who collectively have the power to undermine the Court's legitimacy. As it stands, the Court's actions in Africa have only fueled the belief that when the Court acts against weaker and poorer countries in Africa (and around the world), it does so for colonial and imperialistic reasons on behalf of the West.<sup>136</sup>

#### B. *The UNSC's Control over the ICC*

The Court's relationship with the UNSC serves as further troubling proof that the West has some control over the Court's actions. As seen in al-Bashir's case, the UNSC has the ability to refer—and defer—cases to the Court.<sup>137</sup> The UNSC is comprised of fifteen members, five of which—the United States, France, Britain, China, Russia—are permanent members with the other ten being rotating members.<sup>138</sup> As permanent members of the UNSC, the United States, France, and Britain coordinated a referral of the Darfur situation to the ICC.<sup>139</sup>

UNSC members which are not party to the Rome Statute—like the United States, China, and Russia—may still vote on whether the Court should indict and try citizens of any country across the world.<sup>140</sup> Unlike the

---

135. Kezio-Musoke David, *Kagame Tells Why He Is Against ICC Charging Bashir*, DAILY NATION (Aug. 3, 2008). Note that this author searched for an original transcript of Kagame's statement in vain. The Daily Nation's version appears authoritative.

136. See Tosa, *supra* note 125, at 55–56.

137. van der Vyver, *supra* note 111, at 695–97.

138. UNITED NATIONS SECURITY COUNCIL, *Members*, <https://www.un.org/securitycouncil/content/security-council-members> (last visited Dec. 17, 2019).

139. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

140. Recall that in Part II above it was noted that the UNSC can pass resolutions that bind all UN Member States. Currently, there are 193 recognized UN Member States, while only 122 States are Party to the Rome Statute. See UNITED NATIONS, *Growth in United Nations Membership, 1945–Present*, <https://www.un.org/en/sections/member-states/growth->

Court, the UNSC has a political mandate; most, if not all, of its actions are politically motivated.<sup>141</sup> The relationship between the Court and the UNSC compromises the Court's role as an organization that is independent and outside the political realm.<sup>142</sup> The UNSC's influence over the Court allows it to direct the Court's power in order to exact "international justice" on weaker, poorer countries that do not wield power in any international forum.<sup>143</sup> This is extremely troubling, as three of the UNSC's five permanent members have not bound themselves legally to the Rome Statute and the Court. For the weaker and poorer countries located in Africa, the UNSC's control over the ICC is simply another neo-colonial tool to maintain the hierarchies that were set in place before, during, and after the Scramble for Africa.<sup>144</sup>

The unfettered access given to UNSC States that are not party to the Rome Statute is an issue the Court must contend with, but it has yet to see this entanglement as a problem.<sup>145</sup> The current ICC Prosecutor, Fatou Bensouda, has previously stated that the Court is "not a tool in the hands of [Western] politicians who think they can decide when to plug or unplug us."<sup>146</sup> So far, however, the UNSC has referred cases from just two countries to the ICC—Sudan and Libya.<sup>147</sup>

### C. Responses to the Legitimacy Crisis and Impact on the ICC's Prosecutions of African Heads of State

African leaders have responded to the biased and neo-colonial nature of the Court in various ways. For al-Bashir, that entails continuing to resist arrest and extradition to the Hague when he visits other African states. Despite the PTC's ruling that Sudan should surrender al-Bashir and that UN Member States should arrest and extradite him pursuant to the UNSC's resolution, al-Bashir has yet to be apprehended and his trial at the ICC has yet to commence. In 2016, Quartz Africa reported that in the seven years he had been wanted by the ICC for war crimes (from 2009 to 2016), al-Bashir made seventy-four trips across the world.<sup>148</sup> He continues his travels

---

united-nations-membership-1945-present/index.html; INT'L CRIMINAL COURT, *States Parties to the Rome Statute*, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

141. Bethel Aregawi, *The Politicisation of the International Criminal Court by United Nations Security Council Referrals*, ACCORD (July 21, 2017), <https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals>.

142. *Id.*

143. Tosa, *supra* note 125, at 55–56.

144. Seymour, *supra* note 6, at 120–21.

145. Seymour, *supra* note 6, at 118–19.

146. *Id.*

147. ICC Situations, *supra* note 4.

148. *Sudan's President Has Made 74 Trips Across the World in the Seven Years He's Been Wanted for War Crimes*, QUARTZ AFRICA (Mar. 4, 2016), <https://qz.com/africa/630571/>

unimpeded because African states, both those that are party to the Rome Statute and those that are not,<sup>149</sup> continue to defy the ICC's ruling by knowingly and willingly harboring a fugitive wanted by the Court.

With AU Member States flouting their legal obligations to the Court and their moral responsibilities to the world, it is difficult to say whether al-Bashir will ever be apprehended and tried for the atrocities committed in the Darfur region. This impedes the ICC's ability to effectively carry out its mandate. The ICC's lack of a police force means the Court is wholly dependent on states to implement its decisions, and the AU's conscious obstruction has hampered the Court's ability to pursue justice for African victims.

Unlike the al-Bashir case, the Kenyatta and Ruto matters have been resolved. The AU opposed the ICC's indictment of the Kenyans because their continuous presence at the trials in the Hague—as required by article 63(1)<sup>150</sup>—would have a “negative effect on the demanding responsibilities of African presidents.”<sup>151</sup> In order to prevent Kenyatta and Ruto from having to confront conflicting obligations, the Kenyan government and the AU took steps to terminate the cases, or at least to have them postponed while the two were serving as President and Deputy President.<sup>152</sup> The AU lobbied to have Kenyatta and Ruto excused from constant presence during the course of their trials and argued that they should be able to choose which sessions of their trials to attend, so that they could still properly carry out their elected roles.<sup>153</sup>

In response, the Trial Chamber granted both Kenyatta and Ruto a conditional excuse from their trials, departing from the general rule of continuous presence in article 63(1).<sup>154</sup> Explaining that Court judges have the discretion to “excuse an accused on a case-by-case basis,” the Trial Chamber excused Kenyatta and Ruto from all hearings except for opening and closing statements and the delivery of the judgment.<sup>155</sup> However, the Appeals Chamber quickly reversed this ruling, deeming it “a blanket excusal before the trial had even commenced, effectively making absence the general rule and [their] presence an exception.”<sup>156</sup> The Appeals Chamber did agree that judges had discretion in deciding which hearings could be

---

sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes.

149. Since 2009, al-Bashir has made at least twenty-six trips outside of the African continent to China, India, Iran, Iraq, Kuwait, Qatar, and Saudi Arabia.

150. Rome Statute, *supra* note 2, art. 63(1) (“The accused shall be present during the trial.”).

151. Knottnerus, *supra* note 14, at 165.

152. *Id.* at 165–66.

153. *Id.* at 165.

154. *Id.* at 166.

155. *Id.*

156. *Id.*

missed,<sup>157</sup> but absences must be limited to exceptional instances.<sup>158</sup> The Appeals Chamber concluded that Kenyatta and Ruto would not have to attend all of their hearings but would still have to attend most.<sup>159</sup>

In light of this outcome, Kenya and the AU turned to the ICC's Assembly of States Parties ("ASP") for recourse.<sup>160</sup> The AU called on the ASP to amend articles 27 and 63 and the Rules of Procedure and Evidence ("RPE").<sup>161</sup> Consequently, the Assembly made three amendments to the RPE's rules on presence at trial.<sup>162</sup> The first two amendments allow defendants to appear at their hearings through the use of video technology and allow the Trial Chamber to excuse defendants for reasons deemed exceptional (as required by the Appeals Chamber). Additionally, the ASP inserted new Rule 134 *quater*, which states that requests for excusal by persons who are "mandated to fulfill extraordinary public duties at the highest national level" are to be granted under a number of circumstances, including when it is in the interest of justice.<sup>163</sup> The final amendment was adopted to ensure that the Trial Chamber expeditiously considers requests for excusal from defendants with extraordinary public duties.<sup>164</sup>

The amendments to the RPE were undoubtedly victories for Kenya and the AU, particularly the addition of Rule 134 *quater*.<sup>165</sup> The rule effectively reversed the Appeals Chamber's ruling on Kenyatta and Ruto's presence during their trials.<sup>166</sup> It "allows the absence of the accused to be the rule

157. *Id.*

158. *Id.* at 166–67.

159. *Id.* at 167.

160. The Assembly of States Parties ("ASP") "is the Court's management oversight and legislative body and is composed of representatives of the States which have ratified or acceded to the Rome Statute." The ASP's role is to provide management oversight to the Presidency, the Prosecutor, and the Registrar regarding administration of the Court. Additionally, the ASP adopts the Rules of Procedure and Evidence and the Elements of Crime. See INT'L CRIM. CT., *Assembly of States Parties*, <https://www.icc-cpi.int/asp> (last visited Dec. 17, 2019).

161. Kottnerus, *supra* note 14, at 166.

162. *Id.* at 167 (noting that the amendments were Rules 134 *bis*, *ter*, and *quater*). The ASP did not make any amendments to the articles. *Id.*

163. *Id.*

164. *Id.* at 168.

165. *Id.* at 168–69.

166. Rules of Procedure and Evidence, INT'L CRIM. CT., rule 134 (2013). Rule 134 *quater* allows for absence from trial proceedings in the Hague if the defendant has extraordinary public duties to attend to. The text of Rule 134 *quater* states:

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial. 2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully



rather than the exception and suggests that excusal decisions do not have to be on a case-by-case basis or that the period of the excusal has to be limited by what is strictly necessary.”<sup>167</sup>

Soon afterward, Kenya and the AU scored additional victories. In 2014, President Kenyatta kept an election promise by cooperating with the Court to prove his innocence.<sup>168</sup> To do so, he briefly handed over the reins to Ruto, stepped down as President, and attended a hearing in the Hague in October 2014.<sup>169</sup> Nevertheless, shortly after his visit to the Court, Bensouda announced she had withdrawn all charges against him because the Government of Kenya had failed to cooperate with the Court.<sup>170</sup> The Prosecutor stated that the government had failed to turn over relevant documents and had intimidated witnesses in Kenya.<sup>171</sup> Sixteen months later, the ICC dropped its charges against Ruto as well.<sup>172</sup> Despite Bensouda’s admonitions, Kenya and the AU claimed the dropped charges as victories.<sup>173</sup> In their view, this was proof that the ICC was a politicized and hypocritical institution that only served as an ongoing threat to the stability and sovereignty of African states.<sup>174</sup> In its almost decade-long campaign against the ICC, this proof was the AU’s biggest win yet.

In sum, African leaders have criticized the ICC for being hypocritical, inconsistent, and a tool for neo-colonialism.<sup>175</sup> Though many of these accusations are self-serving,<sup>176</sup> they hold some truth when considered within the context of the ICC’s role as a multilateral, justice-seeking organization working within historically racist structures and within the context of its relationship with the UNSC. The ICC’s actions in Africa do not instill confidence in the Court as the bastion for fairness and equality the continent expected it to be. From the AU’s perspective, the indictments of al-Bashir, Kenyatta, and Ruto demonstrate that the ICC has allowed itself to become politicized by the same Western countries that refuse to accede to it and to its founding treaty. Thus, the Court’s legitimacy as an apolitical,

---

ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.

167. Knottnerus, *supra* note 1415, at 168.

168. *Id.* at 169.

169. *Id.*

170. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Notice of Withdrawal of Charges, ¶ 2 (Dec. 5, 2014).

171. INT’L CRIM. CT., *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Withdrawal of Charges Against Mr. Uhuru Muigai Kenyatta* (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>.

172. *ICC Dismisses Case Against Kenya’s Ruto*, AL JAZEERA (Apr. 5, 2016), <https://www.aljazeera.com/news/2016/04/kenya-ruto-hear-icc-case-dropped-160405065408564.html>.

173. Knottnerus, *supra* note 14, at 170.

174. *Id.*

175. Seymour, *supra* note 6, at 120–21.

176. *Id.*

independent judicial body has been undermined. Until the Court addresses its lack of legitimacy, it will continue to lose the respect and support of African states and leaders, and those leaders will continue to undermine its work.

#### IV. SOLUTIONS

If the Court continues down this path, the AU may move ahead with its threats to coordinate a mass withdrawal of its Member States from the Rome Statute. It is unlikely that the legitimacy the ICC does have could withstand such a withdrawal.<sup>177</sup> Thus, in order to maintain some form of legitimacy, the Court needs to either move away from the overt politicization of its decisions or establish complementarity with the local courts of African states.

##### A. Mass Withdrawal

Since al-Bashir's indictment in 2009, the AU has proposed various solutions to side-step the ICC.<sup>178</sup> The two that gained the most traction with AU Member States were the proposals to institute a mass withdrawal of African states from the Rome Statute and to create an independent, African court with the same subject-matter jurisdiction as the ICC.<sup>179</sup> So far, neither plan has been fully implemented.<sup>180</sup> While each proposed solution has its merits and drawbacks, the creation of an AU court that has an overlapping jurisdiction with the ICC is the better idea.

After its bi-annual summit held in January 2017, the AU "[a]dopt[ed] the [AU] ICC withdrawal strategy along with its Annexes, and call[ed] on Member States to consider implementing its recommendations."<sup>181</sup> The AU's withdrawal strategy calls for mass withdrawal based on "the systemic

---

177. *Id.* Unfortunately, the ICC lacks the institutional legitimacy that the UN enjoys as a result of its near universal membership and the support it receives from the most powerful states.

178. Ssenyonjo, *supra* note 14, at 386–388.

179. Konstantinos D. Magliveras & Gino J. Naldi, *The International Criminal Court's Involvement with Africa: Evaluation of a Fractious Relationship*, 82 NORDIC J. INT'L L. 417, 445 (2013).

180. As of this writing, Burundi is the only African nation to have withdrawn from the ICC. See *supra* note 69. The AU adopted the Malabo Protocol in 2014 with the intent of merging the African Court of Justice and Human Rights and the African Court on Peoples' and Human Rights to create a court that would give African states primary jurisdiction over international and transnational crimes. The Protocol needs to be ratified by fifteen states to become effective, but so far it has only been ratified by seven. Maram Mahdi, *Africa's International Crimes Court Is Still a Pipe Dream*, INSTITUTE FOR SECURITY STUDIES, (Oct. 15, 2019), <https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream>.

181. African Union Assembly, 28th Sess., Draft Decisions and Declarations, Assembly/AU/Draft/Dec.1(XXVIII) Rev.1, ¶ 8 (Jan. 30–31, 2017).

imbalance in international decision-making processes.”<sup>182</sup> The document continues by highlighting the disproportionate and politically-motivated nature of the UNSC’s (and thus the ICC’s) decision-making process:

[t]he inherent politics of such processes result in unreliable application of the rule of law. In this regard, the decisions of the United Nations Security Council (UNSC) are made on the basis of the interests of its Permanent Members rather than the legal and justice requirements. Needless to say, these interests are not always in line with those of Africa, thereby leading to a perception of a double standard against African States.<sup>183</sup>

While the AU’s call for African states to withdraw from the Rome Statute and from the Court is understandable, it is ill-conceived. An exodus of African states *would* severely limit the number of states over which the Court has immediate jurisdiction. However, it would do little to stop African leaders from being indicted, as the UNSC’s referral power allows the Court to side-step the sovereign immunity of all UN Member States, even those that are not party to the Rome Statute.<sup>184</sup>

In the Constitutive Act of the African Union, its founding document, the AU claims that one of its goals is to ensure that the human rights of the peoples of Africa are promoted and protected.<sup>185</sup> A withdrawal from the only body that is investigating and holding leaders accountable for the atrocities they commit would only serve to indicate that the AU believes maintaining political power is more important than securing and maintaining the rights and safety of the peoples of African states. Thus, instead of bolstering the AU’s place in the sphere of international justice, a mass withdrawal would only serve to further undermine the international rule of law and place a spotlight on the AU as a hypocritical organization.<sup>186</sup>

Notably, the loudest individual voices calling for the withdrawal of AU Member States from the ICC are those of leaders whose participation in conflicts within their own countries could rise to the level of an international crime.<sup>187</sup> The call for withdrawal therefore seems to be a self-serving and hypocritical attempt to shield actors who are committing egregious crimes from the reach of the Court. Yet, as shown above, the UNSC’s reach is long and simple withdrawal from the Court may not prevent these actors from being charged with committing international crimes in the future. Therefore, mass withdrawal would only create bad optics for the AU and the leaders of

---

182. See Withdrawal Strategy Document, *supra* note 68, ¶ 8 (Jan. 12, 2017), [https://www.hrw.org/sites/default/files/supporting\\_resources/icc\\_withdrawal\\_strategy\\_jan\\_2017.pdf](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf).

183. *Id.*

184. See Part II *supra*.

185. A.U. Charter pmb., art. 2.

186. Seymour, *supra* note 6, at 116.

187. Seymour, *supra* note 6, at 116.

its constituent Member States and could delegitimize the regional body in the eyes of the international community.<sup>188</sup>

### B. *Creation of a Regional International Crimes Court*

While the AU's withdrawal proposal is ill-advised, its proposal to establish an international criminal section of the African Court of Justice and Human and Peoples' Rights is more meritorious.<sup>189</sup> After discussing the latter proposal, the AU released a draft protocol to implement the proposal on June 27, 2014, called the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, or the Malabo Protocol.<sup>190</sup> The newly proposed section of the African Court would have the same subject-matter jurisdiction to prosecute international crimes as the ICC.<sup>191</sup>

A regional court with concurrent jurisdiction would serve the interests of both the ICC and the AU. Because the ICC steps in where there is no local court that is able to prosecute, the introduction of a regional court would help to limit the amount of time and resources it extends on the continent. The AU would also benefit from such an arrangement, if the regional court is able to mete out justice to the perpetrators of international crimes in a manner that is impartial, effective, and efficient.

However, even a regional court would still have to contend with issues of sovereign immunity. Foreseeing this problem, the draft protocol prevents heads of state from being prosecuted while they are in office.<sup>192</sup> This protection disappears once they leave office: The proposal dictates that "the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment."<sup>193</sup> Nevertheless, as it relates to the pursuit of justice, the AU's proposal is undoubtedly more limited in its ability to touch heads of state than the Rome Statute as it prevents the prosecution of heads of state while they hold office. While the proposal's drafters may see that as a win, it risks creating even more dictatorships on

---

188. See e.g., Regine Cabato, *Philippines Leaves International Criminal Court as Duterte Probe Is Underway*, WASH. POST (Mar. 18, 2019), [https://www.washingtonpost.com/world/asia\\_pacific/philippines-leaves-international-criminal-court-as-duterte-probe-underway/2019/03/18/f929d1b6-4952-11e9-93d0-64dbcf38ba41\\_story.html](https://www.washingtonpost.com/world/asia_pacific/philippines-leaves-international-criminal-court-as-duterte-probe-underway/2019/03/18/f929d1b6-4952-11e9-93d0-64dbcf38ba41_story.html) (speaking on the international perception of Philippines president Rodrigo Duterte after he withdrew his country from the Rome Statute in March 2019).

189. Malabo Protocol, *supra* note 63.

190. *Id.*

191. *Id.* art. 28A. Both courts would hear matters on genocide, war crimes, crimes against humanity, and crimes of aggression but, as it was meant to be more expansive and transnational, the African Court also has jurisdiction over other matters that the ICC does not, including the crimes of unconstitutional change of government, money laundering, illicit exploitation of natural resources, etc. *Id.*

192. *Id.* art. 46A *bis*.

193. *Id.*, art. 46B(2).

the continent. Namely, if the best way for heads of state to avoid charges is by never leaving office, it is likely that, given the opportunity, they will attempt to remain in power indefinitely.

Furthermore, the AU's proposal does run into at least one additional issue: Inter-state power dynamics are bound to weave themselves into the decisions of regional courts. A regional court has the potential to encounter the same problems the ICC faces, with more globally dominant countries exerting control over the operations of the court. Just as in the global context, certain states within Africa wield more power and wealth than others, and these are usually the states that have greater influence over the actions of the rest of the continent.<sup>194</sup> It follows, then, that these same states and their leaders have the potential to control the prosecutorial agenda of the African Court of Justice and Human and Peoples' Rights. This domination has the power to undermine the legitimacy of that court just as much as the UNSC's domination has the power to undermine the ICC's legitimacy.

### C. Solutions for the ICC

There are changes that the ICC can make to regain some legitimacy in the eyes of the AU and its supporters, thereby preventing the mass withdrawal of African states. Severing or lessening the relationship between the ICC and the UNSC, returning to the expected principles of fairness and transparency that brought African nations on board, and making an effort to work alongside the legal and cultural institutions that are in place in African nations to counter the impression that they are working against them would help the Court to regain some of its legitimacy.

The ICC could minimize or sever its relationship with the UNSC. As the relationship stands, the UNSC exerts too much influence over the Court. This is both hypocritical, as three-fifths of the Security Council's permanent members are not themselves Parties to the Rome Statute, and problematic, as the UNSC politicizes the Court and its work.<sup>195</sup> Indeed, it is particularly disturbing when the Court argues "that it derives its moral authority from its claim to pursue international criminal law on legal rather than political grounds."<sup>196</sup> The Court's flawed self-narrative cloaks it in pretense and strengthens the AU's evidence against it by showing that the Court is being deliberately hypocritical in how it operates or naively unaware of how it actually functions in the world.

To restore its legitimacy with African states, the Court should also engage in other forms of what scholars have dubbed "hypocrisy

---

194. *Power Rankings*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/news/best-countries/power-rankings> (last visited Dec. 17, 2019) (ranking Egypt, South Africa, and Nigeria as the three most powerful nations on the African continent).

195. Seymour, *supra* note 6, at 111.

196. *Id.* at 110.

management.”<sup>197</sup> In essence, the Court should realign itself with the ideals that brought African states on board with the implementation of the Court decades ago. In particular, the Court must return to being a body that seeks justice under law and which is not motivated by politics. To re-establish this ideal, the Court must, if it retains its connections to the UNSC, make transparent, published, and in-depth evaluations of the merits of any UNSC charging recommendations. Such measures would allow the Court to at least appear impartial.

Additionally, the Court should work with the social and political mechanisms that exist in the specific regions where it is engaged. Because “the ICC, just like the larger international legal order within which it operates, is Eurocentric and the world views, perspectives and stand points it reflects and embeds are uncompromisingly European,” it is almost inevitable that Western norms and ideas permeate the operations of the Court.<sup>198</sup> Like nearly every other international organization, “[d]istinctively Euro-American ideals and narratives determine [its] perspectives and standpoints.”<sup>199</sup> This is because Europe acts as a “geographical, political, and conceptual epicentre of international legal thought.”<sup>200</sup> In using the mechanisms created by and employed by Western and European countries, the Court runs the risk of isolating non-Western countries like those in Africa.

In contrast, if it employs a prosecutorial system that fits within the structures that currently exist in each region, the Court has a greater chance of building relationships with states and of ultimately receiving their cooperation and support.<sup>201</sup> In particular, the Court could undertake two simple measures that would allow for better integration and cooperation between itself and AU Member States. First, the ICC Prosecutor could travel to all African states to meet with regional judiciary, prosecutors, lawyers, and civil society in an attempt to establish constituencies in each country that would help create or enhance support for the Court. Second, the President of the Court and the President of the Assembly of States Parties could plan and engage in “programmatic activities at the national, regional and international levels for judges, prosecutors, and lawyers from state parties to enhance [their] knowledge and understanding of the ICC’s work and to enhance complementarity within the state parties.”<sup>202</sup> This is vital to the Court retaining (or regaining) its legitimacy, especially in Africa.

---

197. *Id.* at 121–22.

198. Awol K. Allo, *The ICC’s Problem Is Not Overt Racism, It Is Eurocentricism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html>.

199. *Id.*

200. *Id.* (internal quotation marks omitted).

201. See M. Cherif Bassiouni, *Concerning the ICC Withdrawal Problem*, ICC FORUM (Nov. 15, 2016), <https://iccforum.com/withdrawal#Bassiouni>.

202. *Id.*

Remember that the relationship between the ICC and the AU soured because of the Court's perceived bias in prosecuting African leaders. Requiring the leaders of the Court to visit African states could help to improve the standing of the Court across the continent by offering an alternate view of the work the ICC does. Unsurprisingly, citizens of each AU Member State are likelier to come across their leaders' sentiments about the ICC than the ICC's own representations of its actions. By presenting its own narrative to African peoples, the ICC could help bolster its reputation with the citizens of each country by offering an alternate view of the work the Court is attempting to accomplish. As a result of hearing alternative perspectives, each citizen would be better positioned to form an independent opinion of the Court's value. Furthermore, linkages between the Court and local justice systems should help both the Court and local justice organizations bring about an equitable end to the impunity that plagues so many African states.

Not only would this effort enhance the ICC's visibility and credibility, but it would also enhance the role of national legal systems through complementarity. Because it is bound by the principle of complementarity, the ICC can only investigate and prosecute international crimes when national jurisdictions are unable or unwilling to do so.<sup>203</sup> The principle reflects the idea that it is preferable for international crimes to be investigated and prosecuted in the country where they occurred.<sup>204</sup> Moreover, when local courts assist the ICC in carrying out its duties, it is a boon for a body that does not have a police force. This is particularly true in countries that are not signatories to the Rome Statute.

Additionally, this cooperation could help the Court learn how to work within the justice systems that are already in place in each country. Learning the particularities of each country's justice system could allow the Court to work within or around the legal and cultural institutions at work in each nation. Each African country has a legal system that in some respects operates differently from the Euro-American system that the ICC uses and that these countries are already hostile to. By creating a system which integrates aspects of those countries where it is investigating a crime, the Court has a greater chance of securing cooperation. This integration does not necessarily mean adopting the laws or rules of any given state, it could be as simple as holding proceedings in the country or in the region—a proposal suggested by the UNSC when it issued the Resolution for al-Bashir's arrest.<sup>205</sup>

---

203. Jo Stigen, *The Relationship Between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, in 7 F. INT'L CRIM. HUMANITARIAN L. PUBLICATION SERIES 1, 134 (2010).

204. Bassiouni, *supra* note 201.

205. S.C. Res. 1593, *supra* note 38 at ¶3 (inviting the AU and the ICC to "discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court,

## V. CLOSING REMARKS

The ICC's blanket rejection of sovereign immunity and its close relationship with the UNSC delegitimize the Court. As an organization that relies on the cooperation of states across the world, this is something the Court cannot afford. While the ICC must be seen as a fair and impartial body in order to function, its decade-long fight with the African Union over the disproportional charges levelled against African nationals has weakened its stature with African states. This has led the AU to call for a mass withdrawal of African nations from the ICC and to propose the implementation of its own regional court to handle international matters. In order to repair its relationship with the AU and the African continent, the ICC needs to confront and remedy its own biases before it can expect to (re)gain the respect and cooperation of African states and their leaders. In order to do this, the Court has to sever or lessen its relationship with the UNSC which causes it to be more political than its original mandate intended, implement a system that allows for transparency (especially as it relates to UNSC Resolutions), and work with the legal and cultural institutions that are in place in the region to help foster cooperation among the parties. Impunity for international crimes is rampant on the continent. As it stands, the ICC is the only court that can hold those responsible to account, but its legitimacy hangs in the balance. If that remains true, it will be a detriment to the peoples of Africa.

---

including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity”).



